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RECORD OF ORAL HEARING

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte JAMES R. GROSS, BRIAN E. BOEHMER,
JOHN P. ERSPAMER, and JOHN PERRY BAKER

Appeal 2008-002545
Application 09/774,248
Technology Center 3700

Oral Hearing Held: Thursday, October 22, 2009

Before DEMETRA MILLS, MELANIE L. MCCOLLUM and STEPHEN G. WALSH, *Administrative Patent Judges*.

ON BEHALF OF THE APPELLANTS:

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The above-entitled matter came on for hearing on Thursday, October 22, 2009, commencing at 9:19 a.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, 9th Floor, Hearing Room B, Alexandria, Virginia, before Kevin Carr, Notary Public.

THE USHER: Good morning. Calendar Number 61, Mrs. Lee.

JUDGE MILLS : Good morning, Mrs. Lee.

MRS. LEE: Good morning.

JUDGE MILLS: Can you get settled, and when you are settled, you'll have 20 minutes and you can begin when you're ready. And we are familiar with the issues in this case, and if you'd like to particularly focus your comments on where you believe the controversy is, that would be helpful to us.

MRS. LEE: Okay. Is the Examiner joining us this morning?

JUDGE MILLS: I was not indicated that that was going to happen. Those individuals weren't with you.

MRS. LEE: No. No, I wasn't sure if she was.

JUDGE MILLS: They are welcome to come in if you have the inventor, or whoever.

MRS. LEE: Oh, no. No, just myself.

JUDGE MILLS: Okay.

MRS. LEE: I can barely see everyone.

JUDGE MILLS: Oh, I know.

MRS. LEE: Well, I'll begin. My name is Sandra Lee. I am here on behalf of BKI Technologies, which is the same as Buckeye Technologies. I am the attorney of record, and I am from Baker Botts in the New York office. As you mentioned already, I assume everyone is familiar with the case that we're talking about. And the main points that I'd like to raise today are the designations of the layers between our claimed invention and what's disclosed in Hammonds, which is the primary reference being used against us. So, with respect to our invention, if I could just spend a couple of

minutes to make sure that we're all clear on what the claimed embodiments are, primarily we're looking at claims 1 and 12, which are the independent claims.

Our invention is directed to an absorbent article which contains an absorbent core. Now, the absorbent core contains three layers, the first one being an acquisition layer, the second one being a storage layer, and a third one being a wicking layer. Although we have multiple components, our focus for this particular invention is on the wicking layer. In claim 12 we also have the inclusion of a top sheet, which is moisture permeable, as well as a moisture impermeable bulb back sheet, which is disposed beneath the wicking layer.

JUDGE MCCOLLUM: Is there a particular figure in the specification that you should point to? Figure 1 is -- ?

MRS. LEE: Of course. Figure 1 is a cross-section. Figure 1 includes a top layer as well as a bottom layer. Excuse me, the back sheet and the top sheet and the back sheet . So if you're looking at Figure 1, item number 10 -- I'm not sure how good your copy is .

JUDGE MCCOLLUM: It's a little fuzzy, but --

MRS. LEE: Okay. Item 10 is designated the top sheet, which has the diagonals going from 1 to the 7, let's say. The second layer is our acquisition layer, designated number 11. Third is the storage layer which is designated 12, which in Figure 1 is the largest layer. The next item is the wicking layer, which is item 13; and, lastly, the moisture-impermeable back sheet is item number 14, which is on the bottom. To the left side of Figure 1 you have a section drawn out to be 15. Fifteen is what we are terming the

absorbent core. Fifteen is inclusive of the acquisition layer, storage layer, and wicking layer.

JUDGE MCCOLLUM: Okay. Thank you.

MRS. LEE: Of course. Of course. Now in terms of the functionality of the different layers, I think it's important to point out a few points. With respect to the focus on the absorbent core, the three components in the middle, our acquisition layer is the layer which efficiently collects the fluid and temporarily holds the fluids there while it passes and transports it along to the storage layer.

JUDGE MCCOLLUM: Does the specification define the term that way?

MRS. LEE: Yes. Yes, I can actually give you the citation for that. If you look at -- I guess I have a copy of the published application here.

JUDGE MCCOLLUM: Okay. That's not what we have before us, but --

MRS. LEE: That's okay, because I can go and refer to the Appeal Brief, which will also indicate. So I can give you the actual page numbers as well. So the overall structure, I believe, is discussed on pages of the specification, pages 13 and 14. I apologize. I did not have a copy of the application as filed. The language that I am looking at specifically -- I don't know if you want to make note of this or not, but, in the published application it's paragraph 84, just as a cross-reference point. Midway through the paragraph it indicates that "The acquisition layer, number 11, functions to quickly collect and temporarily hold bodily fluids that have been deposited thereon and which have been transversed through the top sheet, 10.

Additionally, the acquisition layer functions to transport those bodily fluids to the underlying storage layer. So that is the functionality of that particular layer. With respect to the storage layer, which is the next layer in the absorbent core, we're looking at the function which receives and ultimately contains the bodily fluids after coming through the acquisition sheet.

JUDGE WALSH: I have a question for you as you're going over these terms.

MRS. LEE: Of course.

JUDGE WALSH: In the Examiner's Answer, the Examiner reminds us that we shouldn't import limitations from the specification to the claims. Now, I'm wondering if the specification has a limiting definition somewhere where it says this is what acquisition layer must be; and, if there is such a thing, that we look at that instead of using what is usually used in prosecution: the broadest reasonable interpretation of a claimed term. The Examiner seems to be coming from the view that anything that -- that acquires liquid could be an acquisition layer for Claim 1 purposes. Could you address that?

MRS. LEE: Absolutely. With respect to the disagreement on the claim term reference of the different layers -- I think that's what you're getting to -- the term in the claim is "acquisition layer"; is a term known in the art. What I am reading to you from the specification is defined or described in a particular way, which by the way Hammonds, the primary reference cited against us, defines the same way. So using knowledge of one skilled in the art, “acquisition layer”, in the claim, has meaning in and of

itself, that is not inconsistent with how to use an art or how it's used in the specification.

So with respect to looking to what the definition is of the acquisition layer in the specification, it's our position that it's not any more limiting than what would be recognized with the use of just the term "acquisition layer." And, perhaps to that point, this might be a good opportunity if we briefly look at the disclosure in Hammonds to see how Hammonds is defining acquisition layer. Hammonds is U.S. Patent 5,647,863. If we look at column 7, line 40, if you look at the second sentence beginning "The acquisition number, designated item 44, is intended to quickly collect and temporarily hold bodily discharges, particularly menses, deposited thereon or which have transversed through the top sheet, item 38, and transport those discharges to the underlying storage distribution, number –"

JUDGE MCCOLLUM: So let me ask you a question now. Obviously, the Examiner, at least with regard to Claim 1 is considering acquisition layer 44 to be the storage layer. Now, I guess where it says, right here, it temporarily holds bodily discharges, so I guess the problem I'm having is that's a storage layer. I mean, what is it about the way the claim that makes -- that it can't be called a storage layer?

MRS. LEE: It only temporarily holds the fluid.

JUDGE MCCOLLUM: Okay.

MRS. LEE: In which case, both Hammonds and our specification actually indicate and describe what a storage layer is, where it is the end-resulting repository for the fluids that are there.

JUDGE MCCOLLUM: Now, remind me. In your invention does the fluid move from 44 to the wicking layer at all?

MRS. LEE: In my invention?

JUDGE MCCOLLUM: In your client's invention.

MRS. LEE: No. No, I think the 44 number is Hammonds.

JUDGE MCCOLLUM: I'm sorry. Does it move from your storage layer, which the Examiner is using; 40? Yeah, you're right. I did speak incorrectly. Does the fluid move from the storage layer to the wicking layer, or does it never go to the wicking layer?

MRS. LEE: In our invention, it does.

JUDGE MCCOLLUM: Right. So, isn't it temporarily being held in the storage layer before moving to the wicking layer?

MRS. LEE: The wicking layer actually will pull a storage layer in, pulling wicking -- I guess is the right term -- wicking the liquid down from the storage layer, redistributing it back into the storage layer. So to the extent that it is facilitating the distribution of the fluid across the storage member, storage layer, yes. You are correct. It comes down through to the wicking layer and passes back up.

JUDGE MCCOLLUM: Okay.

MRS. LEE: If you'd like a citation for that, I can provide that for you.

JUDGE MCCOLLUM: Well, I mean I guess what I think the Examiner is having trouble with is to say that you really have to really finely define the word storage to say that 44 is not a storage layer, because it does temporarily hold something. In this particular art how long does it have to store to be considered a storage layer? So it brings up the point you need a very precise definition to try to say that that layer is not a storage layer, because I think, and I'm not seeing really precise definitions in the spec that clearly say you can't call this acquisition layer a storage layer.

MRS. LEE: I think that it's difficult in this art to necessarily take meaning away from the claim terms as they are and I appreciate your point that you're making. The fact that the acquisition layer temporarily holds fluid, it's important to note that it also transports it thereafter. It doesn't stop there. It transports it down to the storage layer, and both our specifications describe that, as well as Hammonds, as well. Hammonds also has the same description with respect to their storage layer, their acquisition layer and their storage layer.

JUDGE MILLS: Did we have argument in the Brief that these were terms of art and would necessarily have been understood in a particular way?

MRS. LEE: In the Appeal Brief, we certainly take issue with how the Examiner is changing, I guess, the terminology of what layers are doing, not only nominally, but also functionally. And I think in our Reply, answers allow we address the fact in the Reply Brief that, actually, also in the Appeal Brief we do talk about the fact that the layers that we are using are consistent with the layers that Hammonds is using, in terms of terminology. So in terms of making the argument that these are known in the art, that particular statement, I'm not sure if we've included it in the Appeal Brief, but I am fairly certain that it is described in that manner.

JUDGE MILLS: Okay. Well, if you can, get to the technical aspect of the Hammonds layer, just how it doesn't coincide. I mean, I assume that's your position, that the layers don't fall in line the same as yours do.

MRS. LEE: Not only do they not fall in line nominally, functionally, they do not do the same thing either. That's our position. And we've actually gone back and forth with the Examiner about that point. Even if we appreciate her naming scheme, if you go beyond that and look at the

function, it's not correct. So when you're looking at Hammonds, if you're looking at a figure for ease of reference, we would direct you to Figure number 2 or 3 in Hammonds. They are both cross-sections of Hammonds' absorbent article. So according to Hammonds, item number 38 is his top sheet. It's a reserving at the top there.

The next layer is item 44, which is the acquisition layer. Following that, disposed beneath that, is item 46, which is what Hammond terms as a "storage/distribution layer." Below 46, Hammonds also has a back sheet. Now, flanked on the lateral size of the storage and partially on the acquisition layer are items 48. You'll see two 48s on each side in figure 2. These are lateral numbers. These are indicator layers.

JUDGE MCCOLLUM: You might want to talk a little bit about, or the Examiner seems to, at least with regard to Claim 1, call 46 and 47 the wicking layer.

MRS. LEE: 46 and 48.

JUDGE MCCOLLUM: 46 and 48.

MRS. LEE: Hm-hmm.

JUDGE MCCOLLUM: Thank you. Can you talk a little bit about why you think that's incorrect to do?

MRS. LEE: 46 and 48 relate to a storage/distribution member as well as the indicator side flanking members. And it's our position -- and actually we talk about Hammonds in the background of our application specification -- that if you take 48 and 46 together or apart, either way, neither of them serve as a separate wicking layer.

JUDGE MCCOLLUM: And what do you mean?

MRS. LEE: That it's disposed beneath the surface layer.

JUDGE MCCOLLUM: Well, what do you mean by they're not a wicking layer? What is it? Because they seem to be made of similar materials. They are pulp, as is your wicking layer. So why don't they achieve the purpose of wicking?

MRS. LEE: 46 is the storage/distribution layer, which combines in one-layer attributes of what we've separated out.

JUDGE MCCOLLUM: Hm-hmm.

MRS. LEE: They've combined the attribute to storing as well as distributing across. The indicator members on the side, which she has cited in terms of density, having similar density to our wicking layer, first and foremost are not disposed beneath the storage layer as required by the claims, structurally. Secondly, the indicator member only receives fluid upon the absorbent storage layer reaching capacity, so that you have the blue coloration, for example. So, unless the storage layer reaches capacity, the indicator members will not receive fluid.

JUDGE MCCOLLUM: Okay. But in terms of that considering those three things an entire layer, if you consider it an entire layer it is beneath. And so, I guess what I'm trying to figure out is why just the label or wicking layer excludes that from being one. If it wicks, is there something about it such that it cannot wick? Because that's the word in the claim, and I am just trying to --

MRS. LEE: So in the claim, if you look at the limitations of what we require in our wicking layer, it requires a density, a relatively low density range, which is .05 and .4 grams per cc, as well as being composed of hardwood pulp and particular ratios with respect to the vertical wicking height. The fact that we have a separate wicking layer of a lower density,

none of those three components individually are the same as our separate low-density wicking layer.

At best, actually, if you align structurally and functionally -- if you aligned up the products -- the closest thing in terms of density and not placement, but if you're looking at the indicator member, well, we know that that doesn't receive fluid until it's reached capacity, versus our layer which pulls it out while the storage layer is being filled with fluid. It pulls it out, actively assists it in redistributing across. These are very different in terms of the structure and their function.

Forty-six together will comprise storage and distribution ability, but what they failed to do is recognize that if you separate out those functions into different layers you do have other added benefits. You know, one of the features in our specification, the whole purpose behind the wicking layer is to help distribute fluid in the storage layer or retain a certain level of softness for the wearer, which is in the background of our application. The purpose of the separate wicking layer is to fully use the storage layer without having the negative properties of an entire layer combined.

JUDGE WALSH: In Claim 1, the wicking layer that's described in part 3 of Claim 1, it has a certain wicking height; and, in your Brief, you've argued that Hammonds doesn't provide a corresponding wicking height. And in Claim 3, it says the ratio of the vertical wicking height of the wicking layer to the vertical wicking height of the storage layer is equal to or greater than 1.25.

MRS. LEE: Correct.

JUDGE WALSH: Do I understand that to mean that the wicking height for the wicking layer is greater than the wicking height of the storage layer?

MRS. LEE: It has to be at least the same or greater.

JUDGE WALSH: At least the same or greater.

MRS. LEE: Equal to or greater than 1.25. Right.

JUDGE WALSH: Okay. And you referred us to, I think, it was column 11 of Hammonds where the wicking heights are discussed; and the Examiners pointed to 46 of Hammond as the wicking layer, and it seems like column 11 would support the idea that 46 of Hammond has a greater wicking height than the other part. So why is that not consistent with the way the claim is written?

MRS. LEE: It's not consistent because we are referring to the layers differently.

JUDGE WALSH: Okay. So if we accept your designation and terminology, then the Examiner must be wrong. On the other hand, if we accept the Examiner's view that anything that has components that perform these functions, the functionality type approach, then the Examiner is probably right.

MRS. LEE: Actually, no. That's not correct. No, we are of the strong position that an acquisition layer is not the same as a storage layer. That's a huge difference for us in terms of acquisition layer, both Hammonds, and we describe the acquisition layer consistently, as well as the top sheet. We both describe the acquisition layer as being one that accepts the fluids, temporarily holds it, has an important role to then transport it onto the storage layer.

JUDGE WALSH: So, in your view, acquisition layer must mean something that is described in your specification or in Hammonds' disclosure, and the Examiner is making a mistake by saying the top sheet acquires liquid and transfers the liquid to the layer below.

MRS. LEE: Yes, actually, there's one.

JUDGE WALSH: Is that -- ?

MRS. LEE: Yes, that's true. And, actually, that's a good distinction, because the top sheet -- if we assume the Examiner's position is correct -- if you assume that just by labeling the top sheet the acquisition sheet in Hammonds, which the Examiner's position is, the top sheet has no capacity to temporarily hold fluids to pass them on. Again, it's a term that is known in the art, so the Examiner's indication that you can use a top sheet as an acquisition sheet, we believe it's incorrect.

JUDGE MILLS: Okay. It looks like we are starting to get short on time. Did you have any quick, additional comments about the other rejection in the case, the rewetting?

MRS. LEE: No. We don't. No. We're really focusing on the appeal with respect to how Hammonds is being used and applied.

JUDGE MILLS: Okay. Does anyone have any additional questions here? I believe we understand your position with the case and we'll take it under advisement.

MRS. LEE: Thank you very much for your time. I appreciate it.

(Whereupon, at 9:46 a.m., the proceedings were concluded.)